No. 82-2042

In The
Supreme Court of the United States
October Term, 1983

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

vs.

CHRISTINE VAUGHN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

(1) When a generalized *prima facie* case has been rebutted by defendant's proof of a specific nondiscriminatory reason for the employment action, is the plaintiff required to present evidence concerning the particular conduct in issue in order to establish pretext?

(2) Whether the district court's application of generalized evidence from the *prima facie* case to meet plaintiff's pretext burden effectively foreclosed defendant's opportunity to rebut the inference drawn from the *prima facie* case, and was therefore clearly erroneous or inconsistent with previously enunciated legal standards?

(3) When discriminatory animus has been shown to have been a factor in the decision, may the defendant overcome a finding of discrimination by establishing that the challenged employment decision would have occurred in any event, even absent the discrimination?

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ARGUMENT

I. Whether Respondent Has Misrepresented The Record And Mischaracterized This Dispute As A Mere Factual One, Going To The Weight To Be Applied To The Evidence?

Respondent contends that this case is simply a fact determination falling within the strict scope of Rule 52, Fed. R. Civ. P., and that this Court is therefore limited by its recent ruling in *Pullman-Standard v. Swint,* 456 U.S.

273 (1982) to a consideration of whether the trial court was clearly erroneous in giving more weight to respondent's "proof" than to petitioner's. Respondent creates this questionable "strawman" and then proceeds to knock it down by arguing that there was a disputed fact issue concerning the respondent's performance. That is simply not the case. In that portion of her argument which respondent inappropriately calls "Statement of the Case", she sets forth the following "facts" as though they were established or at least disputed:

That Ms. Vaughn functioned successfully as a sealex operator on other shifts (Brief for the Respondent [Br. Resp.] at 3). While it is undisputed that Vaughn progressed satisfactorily during her first few weeks as a sealex machine operator, there is evidence that she began to have difficulties very soon in that position. She was hired into the sealex operator position on July 13, 1970 on the second shift and progressed through the pay steps according to the Labor Agreement (DX 2, JA 129, 268, Exhibit A). When she reached the top step she had held the job for only two months (DX 35r, JA 130, 288). Two months later, she was transferred to Mr. Brazil's section, still on the second shift (DX 35q, JA 130, 287). She had worked for Brazil for a little over two months when she was transferred to the third shift under Mr. Turnage, who disqualified her for excessive wasted product (DX 35p, JA 130, 286). She now had only six months experience on the job, and one-third of that time she had been rated as "poor."

That Brazil's principal concern was Vaughn's attendance, and that he had "never documented" his production

concerns (Br. Resp. at 5). Although Brazil had documented her attendance problems, performance concerns were also documented by Brazil. On the only opportunity he was given to evaluate Vaughn as a sealex operator, he rated her quantity and quality of work as "poor," and stated that he would not recommend re-hire, because she could "not get production" (DX 36, JA 130, 293-4). That document is the only evidence in the record in which Brazil evaluated Vaughn's performance. Brazil testified that he had talked to Ms. Vaughn about her performance, but that "it never improved. It remained poor." (JA 245). Although Vaughn speaks of Brazil primarily in a later time-frame on other jobs, she does not deny that he had talked to her about poor performance—in fact that is consistent with her complaints that Brazil was harder on her than other employees.

That a "contemporaneous written expression" of his view of her competence "reveals that he was satisfied with her performance." (Br. Resp. 5). It takes a fertile imagination to reach the conclusion that he had been satisfied with her performance based upon the record evidence. In fact, that finding, had it been made, would have been clearly erroneous. The alleged "expression of satisfaction" was an attachment to DX 36 (JA 130, 295), dated January 18, 1971, which has been described in the record as reflecting where the employee was moved after she was "bumped" and showing the jobs for which she was then qualified. This document is pre-printed, and blanks are filled in by a clerical employee to establish "Open Jobs" to which the employee may go, and jobs in which that employee has "Previous Satisfactory Experience". There is no place on the form for an evaluation of the employee,

nor is that the purpose of the form. Brazil would have been incorrect to say that Vaughn did not have "Previous Satisfactory Experience", since she had such experience, as far as he knew, under Supervisor Maynard before him. But when asked to evaluate her, on the form intended for that purpose, only two days after she was bumped, he rated her performance as "poor." He has never been shown to have stated otherwise. The most the Court could say was that Brazil apparently did not consider her problems serious enough to label her work "unsatisfactory." (JA 337). Respondent now tries to stretch that point to a conclusive finding of satisfactory performance, or at least a "contradictory evaluation."[1] That is a distortion of the record.

The important point to be made here is that, even if all of these slanted "facts" were accepted as completely true, it has nothing to do with the issue before this Court. At best, this evidence proves only that Vaughn was at least marginally competent for four months under Maynard, and "poor" but not yet subject to disqualification for two months under Brazil. It does not speak to her performance on the third shift. There the facts are established beyond equivocation. Turnage disqualified her for poor performance, and his motivation is the only issue under legal examination in this appeal.

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[1]As a final point, Respondent points out correctly that the record does not contain an explanation that the entry on the attachment to DX 36 was "inadvertently recorded." Petitioner was incorrect in that explanation; the document which had been so explained was DX 45, a memorandum dated January 1, 1979, referred to by the Trial Court in its first opinion (JA 338) (DX 45, JA 136, 138). The error is harmless, since Brazil had nothing to do with Turnage's evaluation of Vaughn's performance.

Respondent really taxes credulity in her treatment of the evidence concerning Turnage. The argumentative innuendo throughout what was supposed to be a statement of the case bears little resemblance to the record. It is clear that the author did not attend the trial. The respondent states as fact:

That Turnage "conceded that he did not tell Ms. Vaughn what production standard she was expected to achieve, but asserted that she had been warned about the shrinkage problem." What Turnage "conceded" was that he did not express the standard in terms of how many bulbs to produce. As DX 37 (JA 131, 296), and Turnage's testimony demonstrate, the standard was expressed in terms of number of errors, and after checking to be certain that the errors were not the fault of the machine, Turnage told Vaughn the precise number of errors she had made in comparison to workers on the same machines on other shifts (JA 225). He warned her that her error rate was too high (10% or more of the product), and that with that number of errors she could not make production (DX 37, 38, 39, JA 131-2, 223-226). This method is entirely reasonable, particularly when production levels vary per operator between 3500 and 9500 bulbs per day. For the respondent to argue that one method is preferable to the other is one thing, but for a court to base Title VII liability on that preference is an abuse of discretion and clear error.[2]

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[2]Respondent relies upon the assertion that, in this respect, Turnage's decision was "subjective" in the manner disapproved in *Robbins v. White-Wilson Medical Clinic,* 642 F.

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That Turnage "claims to have made" certain contemporaneous notes of his counseling sessions with Vaughn, but petitioner declined to offer corroborating testimony. Apparently only respondent feels as though that testimony needed corroboration. The court specifically credited it, finding there was "no reason to disbelieve any of" Turnage's testimony; there was "virtually no direct evidence of unlawful motivation" as to Turnage; "the burnt wires documented by defendant in fact existed"; "production problems were a genuine concern"; and "she unquestionably had problems with production." (JA 338, Pet. App. B-6 and N. 5). These findings were made despite Vaughn's denial of any warnings by Turnage, the court plainly crediting his testimony over hers. (*See*, JA 43-44.)

That Turnage not only disqualified her but "he also decreed that she would never in the future be eligible to become a sealex operator", even though there was no in-

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2d 153 (5th Cir. 1981) and *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 345 (5th Cir. 1977) *cert. denied* 434 U.S. 1034 (1978). Although it is preposterous to suggest that those cases are somehow analogous to this, they do serve to point out the error in calling Turnage's error rate computations "subjective" in the way that term has been used in cases such as *Robbins* and *James*. In *Robbins*, the Court held that subjectivity tainted the decisions of an interviewer who made certain broad generalizations about prospective employees based upon race, namely that blacks were less likely to have appropriate personality traits than whites. In *James*, the Court was dealing with a company that utilized racially segregated bargaining units, segregated plants, and segregated bathrooms and cafeterias, and found that the all-white supervisory staff could overrule timeliness of application, seniority, or even qualifications *at will* in making job assignments. Neither case should be mentioned in the same breath with this case, much less relied upon as controlling precedent. They are clearly distinguishable on their facts.

dication in the record that a disqualified employee "could never in the future be given an opportunity to requalify." Turnage's notation on DX 41 was simply a statement of the existing shop rule, according to the testimony of Mr. Hunnicutt (JA 137-139). In fact, the trial court found as a fact that the effect of disqualification was essentially a permanent bar to holding that job again (JA 338), absent a showing by the employee of a newly-found ability to perform. Further, even though the grievance procedure applied to her disqualification (JA 148), Vaughn never grieved (JA 342), and she never again sought the sealex job (JA 378). In short, it is simply incorrect to argue, at this stage, that the trial court read into Turnage's motivation an intent to "fix her for good" (Br. Resp. 8), when the court clearly did not so find and no evidence supports that conclusion. Respondent suggests that all of the foregoing evidence "specifically challeng[es] the assertions of the respondent regarding the basis for Ms. Vaughn's disqualification." (Br. Resp. 8). The trial court did not so find, and respondent in saying so distorts the record. The trial court in this case did not base its decision on a finding that Vaughn was a satisfactory employee on Turnage's shift. In fact, the holding is expressly to the contrary. The trial court instead held that, even though the petitioner had established its legitimate reasons, other indirect evidence caused the court to believe that race was somehow "a factor" in the disqualification. The issue is therefore not one of whether a specific fact finding was clearly erroneous, but rather whether a trial court is free to base a finding of intentional race discrimination on irrelevant or marginally relevant generalized factors, in the face of a supervisor's credited non-discriminatory reason for the action.

Respondent, as did the trial court, makes much of the "other" evidence which was supposed to be probative of discriminatory intent. A review of this "evidence" specifically referred to by the respondent shows that she is attempting to build her case upon a foundation that consists of supposition and presumption. First, the respondent sets out findings concerning black representation in the work force which, even if they were the result of discrimination, cannot be the basis for liability in Title VII case. At page 9, the respondent points to pre-act conduct, and statistics which because they are unexplained, are untrustworthy, since they, too, may only reflect pre-act conduct. *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 558 (1977) expressly holds that pre-act or pre-charge conduct cannot be the basis for liability. Moreover, because respondent did not attempt any expert development of the evidence, it is virtually meaningless.

The respondent then relies upon hiring information (Br. Resp. 11) and a purported disparity in discharge rates. Both are meaningless here. Not one of the plaintiffs below complained about hiring, and certainly Vaughn did not. Petitioner was not required to rebut a case which was not before the court. Discharge evidence might be relevant, since discharge is akin to discipline, which again is remotely related to a disqualification from holding a particular job due to performance. But the force of such evidence in this case was virtually eliminated by the fact that, of the several claims made by the plaintiffs based upon discipline, not one other than Vaughn's was successful. As to every claim presented, the respondent gave convincing and legitimate reasons for the result. This eliminated the force of any surface inference that could argu-

ably be drawn from an apparent disparity, because the "disparity" did not go unexplained.

One plaintiff, Marian Gee, did not even contest the legality of her discharge, but rather complained about her disqualification under circumstances strikingly similar to Vaughn's (JA 334-35). In fact, the trial court's findings as to Mr. Maynard's treatment of Crutcher should apply equally to Mr. Turnage—"he made a good-faith judgment about Ms. Gee's ability to perform two particular jobs. There is no persuasive evidence that these stated reasons were merely pretextual." (JA 335). The generalized evidence which had aided in establishing a prima facie case was of no avail on the pretext issue, even though at the time of the decision the trial court believed the petitioner's burden was to disprove a discriminatory motive by a preponderance of the evidence (JA 337). When judged under the proper standard, it is clear that petitioner's evidence as to Gee and Crutcher was overwhelming, while as to Vaughn it should have been at the very least convincing and virtually unchallenged. In none of the cases was there any evidence which could properly be considered to establish pretext under this Court's decisions.

II. Does Pullman-Standard v. Swint Preclude Reversal Of This Case?

The recent case of *Pullman-Standard v. Swint,* 456 U.S. 273 (1982) sets forth a long-recognized rule by which reviewing courts may allow trial judges considerable flexibility in resolving factual questions, thus respecting their ability to judge credibility and weigh the evidence. But *Pullman-Standard* does not call for the abrogation of the requirement of reviewing courts to determine whether a

mistake has been committed or whether the district court's findings rest on an erroneous view of the law. It is primarily upon this latter basis that the petitioner is before this Court, because it is clear from any objective review of the history of this litigation that the District and Appellate Court initially, and consistently thereafter, have judged the petitioner by an improper standard. The petitioner was erroneously required, in effect, to prove the absence of discrimination. There is no "disparate treatment" proof that Turnage discriminated against Vaughn or any other black employee. There is no proof that his reasons for disqualifying her were anything other than a good-faith belief that she could not or would not perform satisfactorily on his late-night shift. The trial court found no evidence going to his unlawful motivation.

Furthermore, there was no other evidence of pretext that respondent could offer, as is evidenced by her agreement to proceed on remand, without additional evidence (Pet. App. B-2). How then, could pretext be established, except by an erroneous view that the petitioner had a duty to preponderate, establishing by the weight of the evidence that it did not discriminate? That transferred burden has permeated this entire litigation. It is interesting that in *Pullman-Standard,* this Court found it suspect that the proper standard for application of Rule 52(a) came only very late in the opinion by the Court of Appeals. *Id.* at 290. At least it came in the same opinion. The proper standard was mentioned in this case only after a motion for reconsideration, an appeal, a motion for rehearing, a petition for certiorari, and a remand; even then it was not applied.

If, for the sake of argument, we were to give the lower courts the benefit of a doubt on this point, it is nevertheless clear under *Pullman-Standard* that the finding of pretext in this case was clearly erroneous. The cases are legion, as set forth in petitioner's Brief on the Merits and in the Brief Amicus Curiae, that generalized workforce statistics and unrelated testimony about other black employees lack probative force, particularly at the pretext stage. This is so because such evidence is not sufficiently related to the specific employment decision in question. Therefore, if it is to be admitted into evidence at all, it is to be accorded little weight unless there is a demonstrable nexus between that evidence and the challenged conduct. *Peques v. Mississippi State Employment Service*, 699 F.2d 760, 766-67 (5th Cir. 1983) (— U.S. —, *appeal pending*).

The determination of intent or motive is an elusive one at best, but intent questions are not insulated from review. If, however, the court erroneously requires a defendant to disprove intent, as was done here, that could adversely color the court's judgment. Further, even if the court properly assigned the burden to the plaintiff, it may still have made a mistake in applying the facts to the law. A court in considering intent may consider circumstantial evidence. Petitioner has never contended otherwise. But *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), requires that the evidence be "focused," that is, related to the issue to be resolved. When, as here, there is no direct evidence of intent, the circumstantial evidence must have some relationship to or causal connection with the challenged employment decision. If it does not, the trial court has failed in its duty

to balance the relevant evidence on each side and determine which preponderates. It has assigned far too much weight to unrelated evidence—weight that is both undeserved and legally precluded at this stage of the litigation. In so doing in this case, the trial court committed clear error, and this Court has the power and the duty to remedy that mistake.

"When findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the fact issue." *Pullman-Standard, supra* at 292. In the instant case, however, there is only one possible resolution. On the weight of the evidence, it is clear that respondent has not met her burden to show pretext. It is also clear that she has no other evidence to offer. Finally, it is clear that the District Court has mistakenly applied the legal precedents of this Court on the issue of pretext. It is therefore entirely consistent with this Court's previous rulings to reverse the lower courts and dismiss the claims of the respondent with prejudice.

III. Whether The Generalized Evidence And Statistics Relied Upon By The Courts Below Were Insufficient As A Matter Of Law To Support A Finding Of Pretext.

As part of her prima facie case, respondent relied upon evidence of an underrepresentation of blacks in the petitioner's white-collar, supervisory and management positions, and an overrepresentation of blacks in the lower job categories (Br. Resp. 10-11). She did not contend or prove that the lower job categories constituted the labor pool from which petitioner selected people to

fill positions in these three categories, and that, therefore, the disparity between black representation in the upper and lower levels indicated that petitioner discriminated against blacks in promotions. The respondent offered no expert analysis of these raw and, in some cases, vague and misleading numbers. Respondent did not identify the labor pool for those jobs even though that is critical in establishing a pattern and practice case. She did not identify or analyze the relevant labor market at all. The Court nevertheless erroneously drew broad, sweeping conclusions based upon this evidence.

Hazelwood School District v. United States, 433 U.S. 299 (1977), requires in any analysis of statistics, except the grossest of disparities, that the relevant labor pool be tailored to eliminate those persons who lack the requisite skills for the positions in issue. Respondent undertook no such tailoring, even though, as she admits, "defendant's overall workforce was roughly representative of the proportion of blacks and whites in the relevant population." (Br. Resp. 9-10). In other words, respondent admits that the petitioner hired blacks in proportion to their representation in the general population which would be significantly higher than their representation in the relevant labor pool of the workforce. This "background evidence" indicates petitioner favors rather than discriminates against blacks in the hiring process.

In the instant case, the court relied upon pattern and practice statistical evidence, unrelated to the conduct in issue, which was not sufficient as a matter of law to establish a prima facie case of discrimination even on those issues to which it did relate. If the court wished to rely

upon statistical evidence, it could have relied upon the evidence of comparatively high black representation in the production workforce of which respondent was a member. Or, even more telling, if the petitioner, who's burden it was on the pretext issue, had presented the evidence, the trial court could have compared the rate of disqualifications for poor performance among blacks and white's in the plant, Vaughn's department and shift and under her various supervisors. Instead the court used unrelated evidence, without analysis or verification, to infer pretext in petitioner's disqualification of respondent. At the same time, the court ignored the more relevant evidence, that is the number of similarly situated white employees who had been treated differently or more favorably by her disqualifying supervisor. There were none. Turnage had disqualified or fail to qualify two white employees in the only other two instances in which he had disqualified or failed to qualify anyone during a probationary period. It was clearly legal error to discount this highly probative evidence in favor of less-relevant statistics when those latter statistics could not even legally form a basis for the inference of discriminatory intent on the non-issue of promotion or discharge discrimination in the Vaughn case.

CONCLUSION

This is not a case wherein th petitioner has sought to limit the nature of evidence which a trial court may consider on the issue of pretext. No argument has been made in favor of a static rule to be applied in all cases. Peti-

tioner merely asks that logic and sound legal reasoning, based upon the concepts of relevance and proximate cause, apply at the pretext stage of a Title VII case as they would in any lawsuit. To argue otherwise is to avoid the burden of proof rule in *Burdine, supra,* which clearly requires a plaintiff to preponderate at the narrowly pretext stage in order to succeed. That is a hollow requirement indeed if the trial court is free to disregard the strong, specific probative evidence on the issue and find liability based upon unrelated evidence which was undeveloped by expert analysis as was respondent's burden and unrebutted by petitioner because it bore no relationship to the facts or conduct in issue as to Mrs. Vaughn. Petitioner therefore respectfully prays that the decisions below be reversed with instructions to enter judgment for the petitioner.

Respectfully submitted,

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